

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00118
	:	
v.	:	
	:	Date: March 10, 2015
GARY K. GRIFFITH,	:	
	:	
Defendant.	:	
	x	

TRANSCRIPT OF SENTENCING HEARING STARTED BUT NOT COMPLETED  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:           AUSA MEREDITH G. THOMAS  
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For the Defendant:           THOMAS J. GILLOOLY, ESQ.  
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Court Reporter:               Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1           PROCEEDINGS had before The Honorable Thomas E. Johnston,  
2           Judge, United States District Court, Southern District of West  
3           Virginia, in Charleston, West Virginia, on March 10, 2015, at  
4           1:58 p.m., as follows:

5           COURTROOM DEPUTY CLERK: The matter before the Court is  
6           the United States of America versus Gary Griffith, criminal  
7           action number 2:14-cr-00118, scheduled for sentencing.

8           THE COURT: Good afternoon. Will counsel please note  
9           their appearances?

10          MS. THOMAS: Meredith Thomas on behalf of the United  
11          States.

12          MR. GILLOOLY: Good afternoon, Your Honor. Tom  
13          Gillooly for Gary Griffith, who is seated here with me.

14          THE COURT: Good afternoon. Before we get started, I  
15          want to raise an issue that has been vexing me for the last  
16          24 hours and I'll just get right to it. As I was preparing for  
17          this -- let me back up.

18          A couple weeks ago, an issue came up in another case,  
19          unrelated to this one, that caused me, for the first time in  
20          probably 20 years, to go back into Chapter 1 of the guidelines  
21          and re-visit the relevant conduct rules and I've spent a lot of  
22          time with those rules over the last two weeks refreshing my  
23          memory on them.

24          Most of the time, relevant conduct seems fairly  
25          straightforward. Often, there's no objections; so it's rare that

1 I'm going to question something where there's no objections or  
2 where it's been agreed to.

3 However, as I was preparing for this sentencing yesterday,  
4 the enhancement for the value of the kickbacks started to eat at  
5 me, and so I started to look at it more closely, and my first  
6 reaction was to go to 2B1.1, and you've got the Base Offense  
7 Level of 6 in Subsection (a), and then right under that is  
8 Subsection (b) (1) that establishes enhancements based on amounts  
9 of losses or gains, and that's the guideline you go to with a  
10 1001 offense.

11 However, (b) (1), Subsection (b) (1) of 2B1.1, is not  
12 something that's applied automatically and, to apply it, you have  
13 to apply relevant conduct rules under Section 1B1.3, and I  
14 started getting into that and, looking more closely at that, and  
15 the more I looked at it, the more I came to the conclusion that I  
16 can't figure out how this enhancement applies to this particular  
17 charge.

18 So, I had my law clerk look at it and he produced an  
19 analysis. I won't go into detail about it, but he produced one  
20 analysis that, frankly, I wasn't particularly convinced by.

21 I talked to the probation officer. She produced an analysis  
22 in support of the enhancement that was different from the one  
23 that my law clerk produced and I also was not convinced by it.

24 So I called the Sentencing Commission. They have a hotline  
25 where you can run issues by them and get their perspective on it,

1 and it was very clear when I talked to the lady at the Sentencing  
2 Commission she knew what she was doing, and she got back with me  
3 rather quickly.

4 And this is an informal opinion. It doesn't have the force  
5 of law, but these people do have expertise in the guidelines, and  
6 the informal opinion I got from the Sentencing Commission is that  
7 this enhancement does not apply.

8 So, that's not the final word on it, but -- and I don't know  
9 what extent you all looked at this, but if you dig into Section  
10 1B1.3, you might have a hard time. I don't know if you all have  
11 dug into that or not in analyzing this. Mr. Gillooly is shaking  
12 his head no. I kind of figured that might be the answer.

13 MR. GILLOOLY: I think I would have said something,  
14 Judge, no. I missed that issue.

15 THE COURT: Well, you know, my first thought when I got  
16 into this was to admonish you a bit about that, but you're not  
17 the only one that missed it, as it turns out, so I'm not going to  
18 -- I think it's not an easy issue and it requires some careful  
19 study of the Relevant Conduct Rules, and it's still possible that  
20 I could be wrong, but I feel that it's at least a serious issue  
21 when the Sentencing Commission is telling me that it doesn't  
22 apply.

23 So, I think what I'm going to do for this case, is I'm going  
24 to ask you all to take a look at it and brief it, or tell me,  
25 yeah, Judge, we think you're right. Obviously, it makes a huge

1 difference in this case, so I'm going to have you brief it.

2 Now, I asked Mr. Hissam and his client to be here today  
3 because the exact same issue exists in that case, even though I  
4 have already sentenced Mr. Barnette.

5 And I've really been struggling with that, Mr. Hissam. By  
6 the way, I appreciate you putting a suit on. You didn't have to  
7 do that.

8 I've really been struggling with Mr. Barnette because -- for  
9 a couple of reasons.

10 By the way, I'll note for the record that Michael Hissam,  
11 Attorney Michael Hissam, is present in the courtroom, along with  
12 his client, Mr. Ronald Barnette, who was sentenced 13 days ago.

13 Rule 35(a) provides that within 14 days of the oral  
14 pronouncement of sentence, a sentence may be modified for clear  
15 error. Now, in Mr. Barnette's case, I'm a little less concerned  
16 than I would be if I had sentenced him to prison but,  
17 nonetheless, the sentencing calculation in that case did  
18 influence the sentence.

19 For example, and specifically, if the 12-level enhancement  
20 had not applied, Mr. Barnette's Total Offense Level, without the  
21 -- without the 5K, would have been maybe a 4. It would have been  
22 extremely low. With the 5K, it may have been below the  
23 guidelines. The chances of me giving home confinement under  
24 those circumstances would be pretty limited. It may have also  
25 affected the amount of the fine.

1           Now, the problem I have is that I'm not prepared today, I  
2 don't think, to say that this is absolutely an error, and I'm  
3 certainly not sure that it's clear error, and I'm not sure I'm  
4 prepared to decide that by tomorrow when the time will run out  
5 for the 35(a), and so I'm not sure how to approach that.

6           That's one of the reasons, Mr. Hissam, I wanted to have you  
7 and your client both here today, so you may or may not be able to  
8 discuss that and come to some sort of a resolution on it.

9           I do think that if I conclude that this is a problem, I can  
10 probably fairly easily modify the term of probation. I don't  
11 know that I would have given a different term of probation, but I  
12 might -- I'm pretty sure I wouldn't have given home confinement.

13           I don't think I can do that with the fine. I'm not sure  
14 what to do with the fine, actually. I don't think there's a  
15 mechanism for me, at least not under the law I've looked at, to  
16 address the fine except under Rule 35(a), but to get to Rule  
17 35(a), I have to conclude that there's not only an error, but  
18 it's clear.

19           This is kind of convoluted, so I don't know how clear it is  
20 in terms of being a clear error. So, I'm not so sure that in the  
21 next 24 hours, I can conclude, A., that this is error and, B., if  
22 it is, if it's clear error.

23           So I wanted to lay all of that out for you, Mr. Hissam, so  
24 that you would be aware of it, and I also -- as I thought about  
25 it, I'm not sure, because Mr. Barnette is not in prison, I don't

1 know if 2255 would apply even. So I think I wanted to give you  
2 this to think about and to chew on and decide what you wanted to  
3 do, if anything.

4 I just -- I guess what I'm saying is I'm really not  
5 prepared, as I sit here right now anyway, to have a Rule 35(a)  
6 hearing on this tomorrow, which would be the last day I could do  
7 it.

8 So, do you have any thoughts on that, Mr. Hissam? And I  
9 know I'm hitting you with this cold, so --

10 MR. HISSAM: Yes, Your Honor. I'll step up. Do you  
11 want me to step up to the podium?

12 THE COURT: Whatever.

13 MR. HISSAM: Just to answer the Court's last question,  
14 my understanding is that a 2255 does apply for a probationer.  
15 The Supreme Court has interpreted in custody and 2254 and 2255  
16 still apply to that statute, as well. So, just to answer that  
17 question, I think that is true.

18 Your Honor, I'm certainly prepared to make a Rule 35 motion  
19 as soon as I return to my office. I understand the concerns. I  
20 understand the -- obviously, I understand the Court's comments on  
21 clear error, and I think the Court understands, also, the context  
22 of plea negotiations and an agreement to a guideline. I think  
23 the Court is well aware that there's a variety of charges at  
24 issue in these various cases.

25 Interestingly, there's very few cases before this Court in

1 this investigation that present the fraud, mail and wire fraud or  
2 honest services fraud under those statutes, and that is very  
3 clearly by the government's design, and by the defendant's  
4 design, and the concerns over relevant conduct.

5 Unlike Mr. Gillooly, I will tell Your Honor that I have  
6 looked at this issue and it is very, very -- it is very, very  
7 complicated, but in the context of plea negotiations, it was also  
8 -- it was the only option, Your Honor, and it -- I understand  
9 that the -- that's probably not a satisfactory answer to the  
10 Court, but when the government is telling you that your client is  
11 going to be indicted with everything under the sun and going to  
12 face relevant conduct that constitutes everything under the sun  
13 and your only option is to take 1001 with a locked table for a  
14 cross reference and to stipulate to that in the plea agreement,  
15 those are the circumstances that defense counsel face.

16 THE COURT: Well, I appreciate that, and I've heard  
17 similar comments in a prior case involving a lot of defendants  
18 that was put together in some haste and I have learned that, for  
19 better or for worse, I have to be vigilant for issues that  
20 counsel either has missed or hasn't raised, and that's where we  
21 are today.

22 I'm not criticizing anybody on this one because this was --  
23 I think this is a difficult issue, at least, to spot. The more I  
24 look at it, the more I think it's a problem, but I'm going to  
25 give the parties in this case an opportunity to weigh in on that.



1 Obviously, that's not going to happen between now and tomorrow.

2 So, I just wanted to put you on notice of it, Mr. Hissam,  
3 and, you know, I think probably the best way -- the best approach  
4 for you to take on this, and I'm not going to tell you how to do  
5 your job, is let's wait and see what these parties come up with  
6 and then, to tee the issue up for me to decide, you know, whether  
7 or not there is error here, but I would be hard pressed to find  
8 that there is clear error between now and tomorrow.

9 So -- and maybe when it's all said and done, I'll look back  
10 and say, yes, that was clear error, I don't know, but I would be  
11 hard pressed to make that finding in the next 24 hours.

12 MR. HISSAM: And I understand that.

13 THE COURT: And, unfortunately, Rule 35(a)'s deadline  
14 cannot be extended, so that's -- I wanted you to be here so that  
15 I could put you on full notice of it.

16 MR. HISSAM: I appreciate that, Your Honor, and I do  
17 understand that and, just so the Court is aware, I do intend -- I  
18 will, of course, consult my client after hearing what was said  
19 today, but I do intend to act promptly, and I imagine that my  
20 client will expect me to take some action to file something, Your  
21 Honor.

22 THE COURT: Well -

23 MR. HISSAM: Because the home confinement, just to  
24 comment on the two things Your Honor mentioned, the home  
25 confinement was -- it had a serious impact on Mr. Barnette.

1 Given the nature of his new business, the business that he is in  
2 now, he does travel quite a bit and on a set schedule, and the  
3 fine, Your Honor, after the forfeiture amount that he did, in  
4 fact, pay, obviously, that was of an impact, and I don't want the  
5 Court to just think that it was just of passing interest. I'm  
6 sure the Court understands that.

7 THE COURT: I understand, and that's why I raised it,  
8 and it would be much worse if he was sitting in prison.

9 MR. HISSAM: Sure.

10 THE COURT: Which is what Mr. Griffith is facing  
11 potentially.

12 MR. HISSAM: Sure.

13 THE COURT: So, I will put it this way. If I end up  
14 ruling, based on the briefing of these parties, that this  
15 enhancement does not apply, I will welcome a 2255 or other  
16 similar appropriate relief filed on behalf of Mr. Barnette.

17 MR. HISSAM: Okay. Thank you, Your Honor.

18 THE COURT: And I will add that I will expedite the  
19 proceedings on that and not refer it to one of the magistrate  
20 judges. So that is probably the best we can do with this at the  
21 moment.

22 MR. HISSAM: Okay. Thank you, Your Honor.

23 THE COURT: Thank you. Appreciate you getting here on  
24 short notice and so well dressed.

25 (Laughter)

1           THE COURT: All right. So how long do the parties in  
2 the Griffith case need to brief this?

3           MR. GILLOOLY: Your Honor, has the Court given any  
4 consideration to whether it's inclined to order simultaneous  
5 briefing, or briefing and a response and a reply, or how it's  
6 going to handle that part of it?

7           THE COURT: It's up to you all. It doesn't matter to  
8 me. I just need to get the issue teed up so I can decide it and  
9 I really think you all need to spend some time in Chapter 1,  
10 1B1.3, in particular, studying this. So -- and, obviously, as  
11 much as anything, because of Mr. Barnette, I don't want to wait  
12 forever on that. So --

13          MR. GILLOOLY: The amount of time that comes to mind  
14 for me, Judge, is two weeks.

15          MS. THOMAS: The United States could probably file  
16 something in a week, if Mr. Griffith wanted -- or Mr. Griffith's  
17 counsel wanted to respond in two weeks.

18          MR. GILLOOLY: I think that would make for a -- for a  
19 more complete briefing, if we could do it that way, Judge.

20          THE COURT: Well, and, in the meantime, it's possible  
21 that you all would come to the conclusion that -- well, in the  
22 meantime, it's possible you all come to the conclusion that the  
23 dumb old judge has it wrong and we had it right to begin with, or  
24 you could come to the conclusion that you agree that it doesn't  
25 apply. Either way, that will streamline things, I suppose,

1 although, if you're going to conclude that I got it wrong, you're  
2 going to have to convince me why.

3 So -- but we'll start out with a week for the government, a  
4 week from today for the government, two weeks from today for the  
5 defendant, and we'll figure it out from there.

6 I will -- I will set -- I will continue the hearing to a  
7 date certain, but I don't know what that date is right now, so it  
8 will be obviously sometime after two weeks. I want to be able to  
9 look at what has been filed and digest it before I re-set it for  
10 a hearing. So it will probably be early April before I re-set  
11 the hearing.

12 Anything else we need to take up today?

13 MS. THOMAS: No, Your Honor.

14 THE COURT: Oh, one other thing, and I have had  
15 numerous discussions with Ms. Jones, the probation officer, about  
16 this, who has been very helpful. She pointed out to me that,  
17 under the same theory, arguably, Mr. Griffith was not in his  
18 position of trust at the time that he made the false statements.  
19 So that's another potential issue you might want to take a look  
20 at.

21 All right. Anything else today?

22 MR. GILLOOLY: Thank you, Your Honor.

23 MS. THOMAS: No, Your Honor.

24 THE COURT: Thank you.

25 (Proceedings concluded at 2:15 p.m., March 10, 2015.)

## 1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court Reporter, certify that  
3 the foregoing is a correct transcript from the record of  
4 proceedings in the matter of United States of America, Plaintiff  
5 v. Gary K. Griffith, Defendant, Criminal Action No.  
6 2:14-cr-00118, as reported on March 10, 2015.

7  
8 s/Ayme A. Cochran, RMR, CRR

March 16, 2015

9 Ayme A. Cochran, RMR, CRR

DATE